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CHARLES ELM

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 12.

RAFAEL CORTES, as Administrator of the goods, chattels and credits of Victor Manuel Santiago, deceased,

Petitioner,

—against—

BALTIMORE INSULAR LINE, INC.,

Respondent.

BRIEF FOR THE RESPONDENT.

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THE COURT PRESS, INC.

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Petitioner,

—against—

BALTIMORE INSULAR LINE, INC.,

Respondent.

BRIEF FOR THE RESPONDENT.

Opinion Below.

The District Court did not render an opinion. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 237) is reported in 52 Fed. (2d) 22.

Questions Presented.

The primary question presented is whether a cause of action arises under Section 33 of the Merchant Marine Act of 1920 (46 U. S. C. A. §688) (hereinafter called the Jones Act) for the death of a seaman resulting from an alleged failure of the defendant shipowner to provide proper medical treatment for an illness contracted by the seaman without fault attributable to the vessel. This question was answered in the negative by the Circuit Court of Appeals for the Second Circuit, and, as a result, that court did not decide but merely assumed, for the purposes of the argument, that the seaman's death was caused or contributed to by the alleged failure to provide treatment.

If this Court answers the statutory question in the affirmative, it should then pass upon the questions of causation, and the allowance of interest from the date of death.

Pleadings.

The complaint is in tort. It contains the usual averments of the appointment and qualification of the plaintiff (petitioner) as administrator, the incorporation of the defendant, the ownership and operation of the S. S. *Delisle* and the employment of plaintiff's intestate as a seaman by the defendant.

It further alleges that the plaintiff's intestate, Santiago, became dangerously ill in Boca Grande, Florida, prior to the *Delisle's* sailing from Boca Grande, Florida, to New York (October 16, 1928); that the officers of the ship failed to give him any medical attention and failed to obtain assistance from passing vessels; that the said officers failed to place Santiago in the hospital room and kept him in the forecastle; that these quarters were dangerously cold and unsanitary and there was insufficient bedding; that no steps were taken for Santiago's relief when the vessel reached Sandy Hook and that he was not removed to a hospital until the afternoon of the following day; that one day later Santiago died.

It charges that the death of Santiago was caused "solely by reason of the negligence of the defendant as aforesaid" (R. 3) and claims Fifty thousand ($50,000) Dollars damages.

The amended answer admits the allegations of ownership of the vessel and employment of Santiago. It denies that he became ill in port and alleges that he became ill at sea after the voyage started. The charges of negligence contained in the complaint are denied.

As a separate defense the amended answer charges

contributory negligence on the part of Santiago in failing to take medicines, to keep his bed-clothes on, to stay in bed and in refusing to obey other instructions of the officers.

Facts.

The *Delisle* sailed from Boca Grande, Florida, on the evening of October 16th, 1928, bound for Carteret, New Jersey. Plaintiff's witnesses disagree as to the time when Santiago first became ill but it is fairly clear from all the testimony that he felt ill during the night after sailing and that the officers were first notified the following morning, October 17th, when the deceased about 8 A. M. reported on deck to the mate that he felt sick, and was sent to bed in the forecastle and given quinine and salts and a light diet with broth. The mate diagnosed his trouble as a little tropical fever, reported to the Captain who thought he was a little grippey and prescribed a purgative and some quinine, and ordered him on a diet, and after he found his temperature was hanging up, ordered orange juice and lemonade in the morning, and broth at noon and evening (R. 81, 88, 97, 108, 109).

On the second morning out the Captain, who had lost a leg previously in saving a seaman's life from a tackle about to break in a storm (R. 98, 99) instructed the third officer who had had first aid training in the Navy, to go to the forecastle to take Santiago's temperature and see what in his opinion was the matter with him. He confirmed the Captain and diagnosed his trouble as a bad cold which might turn into grippe and reported that that was all that was the matter with him. He and the Captain then decided that the physic and quinine was the proper treatment and the third mate went forward to see him twice and sometimes three times a day to see that he took his medicine, consisting of quinine and cathartic pills as he refused to take salts. The third mate and the Captain de-

cided that his fever was not high enough to worry about and that the quinine would probably reduce it, and that special broths should be given him every day by the steward (R. 123, 124, 125). The steward, Fielding, also went to see Santiago on the 17th, the day after sailing, under the orders of the Captain, and prepared a special diet of soups for him which was fed to him daily. The steward attended him daily, giving him his medicine (R. 156, 157, 158). He was also fed orange juice in the morning, at other times tea, and on Sunday soft boiled eggs (R. 160, 161, 164).

The chief mate went into the sailors' quarters where Santiago was two or three times a day and had no suspicion that the man was dangerously ill (R. 111). The third officer and the steward reported daily to the Captain on the man's condition (R. 101).

On the 20th one of the sailors reported to the chief mate, Callis, that Santiago was up and around the forecastle and smoking a cigarette.

On the 21st, the day before the ship arrived at Cartaret, Cullison, the master, saw Santiago sitting on the hatch on deck and thought the man was recovering (R. 99, 103).

The third mate, Kounse, also saw Santiago up on deck on October 21st and saw him walk the full length of the well deck firmly. He did not seem in a condition to work but otherwise all right (R. 125).

His temperature was taken each day, written in the ship's log and was stipulated in the record to have been as follows (R. 7, 8):

Oct. 17	5:45 P. M.	104	degrees
" 17	midnight	102	"
" 18	7 A. M.	104	"
" 19	7 A. M.	103	"
" 20	7 A. M.	103	"
" 21	7 A. M.	103	"
" 22	8:30 A. M.	103	"

Santiago was permitted to remain in the forecastle. The master testified that the hospital room was in the stern away from everybody and that he did not think it necessary to put Santiago there as he saw nothing contagious about his illness and he would get better care forward (R. 101).

The weather on the voyage north was fine (R. 96). The temperatures as taken on the bridge and shown in the ship's log were offered in evidence (Defendant's Exhibit B (R. 177, 178).

The thermometer never went below 70° until the afternoon of October 20th, and averaged about 80° during that time. From noon on October 20th until the vessel arrived in New York Harbor on the evening of October 21st the thermometer varied from a low of 60° to a high of 78°.

The steamer arrived at her anchorage at the mouth of the Raritan River on October 21st at about 6:35 P. M. (R. 112). She lay all night at anchor and proceeded to her dock at Cartaret the following morning. An ambulance was summoned from the Staten Island Marine Hospital in the afternoon and arrived 4:20 P. M. (R. 60). On arrival at the hospital Santiago was in a very serious condition (R. 54), and he died the following morning. His case was diagnosed as lobar pneumonia, with consolidation on both sides.

POINT I.

Plaintiff's case, involving only an alleged breach of the shipowner's contractual obligation to furnish medical treatment, does not fall within the provisions of the Jones Act.

This action was brought at common law and the complaint charges negligence. Although not specifically pleaded, the suit will be deemed to have been founded on Section 33 of the Merchant Marine Act of 1920, referred

to herein as the *Jones Act,* which amended Section 20 of the Seamen's Act of 1915. This Court in the case of *Engel* v. *Davenport* (271 U. S. 33) decided that where such a suit is brought at law and the complaint (containing no reference to the *Jones Act*) charges negligence, the suit is to be regarded as founded on that Act. Plaintiff, indeed, on the argument to dismiss, stated in open court that the suit was brought under the *Jones Act* (R. 92).

At common law and under the general maritime law no civil action lies to recover for death caused by negligence.

> *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 240;
> *The Albert Dumois,* 177 U. S. 240;
> *The Harrisburg,* 119 U. S. 199;
> *Lindgren* v. *United States,* 281 U. S. 38.

The *Jones Act,* however, has modified our maritime law so as to permit a recovery for the death of a seaman as a result of a *personal injury* received in the course of his employment through the negligence of fellow servants. The Act, Section 33 (U. S. C. A. Title 46, Section 688), reads as follows:

> "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

> Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The question is can the Act be construed to apply to a case involving no "personal injury" whatsoever, but merely an alleged failure to take proper care of a seaman who had fallen ill without any fault on the part of the ship.

The Circuit Court of Appeals thought that if a failure to treat the illness aggravated the disease, the aggravated condition would be a personal injury assuming that the statute should be interpreted to cover such a case, saying (R. 190):

> "Analogies may be found in decisions under compensation statutes where acceleration of a pre-existing disease resulting in death is held to come within the term 'injury';"

citing *In re Brightman,* 220 Mass. 17; *Pace* v. *N. D. Workmen's Comp. Bureau,* 201 N. W. 348, 51 N. D. 815. When these cases are examined they do not sustain the analogy drawn.

In the *Brightman* case, a member of the crew of a lighter which was sunk in the harbor made several trips to and from the deck to save various articles and the exertion and excitement caused his death from heart disease from which he had suffered before. In this case it was held there was an injury arising out of and in the course of his employment.

In the *Pace* case, the workman died from apoplexy caused by working in a heated boiler. It was held that the rupture of the blood vessel which caused his death was the result of duties performed in the course of his employment.

Such decisions in compensation cases are hardly authority on the question of what is a personal injury in a case like that at bar where the seaman was suffering from a virulent germ disease in no way arising out of his em-

ployment and no doubt having had its inception before the beginning of the voyage.

The outstanding feature of the Act is the provision giving a remedy for the negligence of the master or a fellow servant in personal injury cases. This had been ineffectually attempted in Section 20 of the Seamen's Act of 1915 (*Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372).

It is significant that there is no reported case (as far as counsel can ascertain) in which a recovery under the *Jones Act* has been allowed in a case involving illness as distinct from injury.

The reference to the statutes applicable to railway employees is to the Employers' Liability Act of April 22, 1908 (Chapter 149, 35 Stat. 65, U. S. C. A. Title 45, Section 51). Section 1 of that Act (the part pertinent to the present argument) reads as follows:

> "LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE. Every common carrier by railroad while engaged in (interstate) commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track roadbed, works, boats, wharves, or other equipment (Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65)."

It has never been contended so far as we know that this Act applied to cases involving the illness of railway employees and no reported case has been found by counsel

even asserting such contention. No duty existed at common law requiring a railroad employer to care for employees becoming ill in the course of their work. The Act did not change the common law in this respect. As stated by this Court in the recent case of *Jamison* v. *Encarnacion*, 281 U. S. 635, 639:

> "The measure was adopted for the relief of a large class of persons employed in hazardous work in the service described. It abrogates the common law rule that makes every employee bear the risk of injury or death through the fault or negligence of fellow servants and applies the principle of *respondeat superior.*"

Inasmuch as the *Jones Act* merely affords to seamen such rights as railway employees had by Federal statutes it seems clear that there was no intention on the part of Congress to create any action for death which in its nature could not have been brought by a railway employee under the *Employers' Liability Act.*

Had Congress intended to provide in the *Jones Act* a death statute comprehensive enough to cover all cases whether arising out of tort or contract, it would have been a simple matter to use the broad language contained in *"An act relating to the maintenance of actions for death on the high seas"* (Mar. 30, 1920, c. 111, §1, 41 Stat. 537). In this Act, passed less than three months before the *Jones Act,* the language used is

> "Whenever the death of a person shall be caused by wrongful act, neglect *or default* occurring on the high seas * * * the personal representative of the decedent may maintain a suit for damages * * * against the vessel, person or corporation which would have been liable if death had not ensued." (Italics ours.)

The words "or default" could be properly construed to

cover liability for failure to comply with a contractual duty to provide medical treatment. It is certainly significant on the question of the intent of Congress, that the *Jones Act,* dealing with a closely related subject, does not include the comprehensive language of the "Death on the high seas" Act.

The *Jones Act* has been construed many times by this Court and the language used consistently shows that the Act is limited in its scope to what are commonly called *personal injuries* resulting from negligence on the part of the ship, its owners, officers or seamen.

The first case construing this Act was *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375. This Court stated in its opinion:

> "The statute is concerned with the relative rights and obligations of seamen and their employers arising out of personal injuries sustained by the former in the course of their employment. Without question this is a matter which falls within the recognized sphere of the Maritime Law and in respect of which the maritime rules have differed materially from those of the common law applicable to injuries sustained by employees in non-maritime service * * *.
>
> Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so."

One of the most recent cases in this Court is that of *Lindgren, Admr.* v. *The United States,* 281 U. S. 38. After citing the Act, the Court stated (pp. 40, 43):

> "By this act, as heretofore construed by this court, the prior maritime law of the United States was modified by giving to seamen injured through negligence the rights given to railway employees by the Federal Employers' Liability Act and its amendments, and permitting *these new and substantive*

rights to be asserted and enforced in actions *in personam* against the employers in Federal and State courts administering common law remedies, or, in suits in Admiralty, in courts administering maritime remedies.

* * * * * * * * *

1. Prior to the adoption of the Merchant Marine Act the general maritime law of the United States did not authorize any recovery of damages or indemnity for the death of a seaman, whether the injury was caused by the negligence of the owner or other members of the crew or the unseaworthiness of the vessel. See *Harrisburg,* 119 U. S. 199; *Osceola,* 189 U. S. 158, 175; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 240.

* * * * * * * * *

By the Merchant Marine Act, however, the prior maritime law was modified by giving to personal representatives of seamen whose death had resulted *from personal injuries* the right to maintain an action for damages in accordance with the provisions of the Federal Employers' Liability Act." (Italics ours.)

* * * * * * * * *

And at page 47:

"The statement in *The Osceola, supra,* 175, on which the administrator relies, relates only to the seaman's own right to recover for personal injuries occasioned by unseaworthiness of the vessel, and confers no right whatever upon his personal representatives to recover indemnity for his death. Apparently for this reason the words 'at his election'—which appear in the first clause of Sec. 33 of the Merchant Marine Act, relating to the personal right of action of an injured seaman, and, as held in *Pacific Co.* v. *Peterson, supra,* 139, gave him, as alternative measures of relief, 'an election between the right under the new rule to recover compensatory damages for injuries caused by negligence, and the right

> under the old rules to recover indemnity for injuries occasioned by unseaworthiness'—were omitted from the second clause of Sec. 33 of the Merchant Marine Act, relating to the right of the personal representative to recover damages for the seaman's death, since there was no right to indemnity under the prior maritime law which he might have elected to pursue. And, for the reasons already stated, and in the absence of any right of election, the right of action given the personal representative by the second clause of Sec. 33 to recover damages for the seaman's death when caused by negligence, for and on behalf of designated beneficiaries, is necessarily exclusive and precludes the right of recovery of indemnity for his death by reason of unseaworthiness of the vessel, irrespective of negligence, which cannot be eked out by resort to the death statute of the State in which the injury was received."

In *Pacific Steamship Co.* v. *Peterson,* 278 U. S. 130, this Court decided that the election given to seamen by the *Jones Act* is between an action to recover compensatory damages under the new rule for injuries caused by negligence and a suit to recover indemnity under the old rules for injuries occasioned by unseaworthiness, saying (pp. 136, 137, 138):

> "Plainly, we think, the right under the new rule to compensatory damages for injuries caused by negligence is not an alternative of the right under the old rule to maintenance, cure and wages—which arises, quite independently of negligence, when the seaman falls sick or is injured in the service of the ship, and grows out of that which was termed in *Montezuma* (C. C. A.), 1927 A. M. C. 1423, 19 F. (2d) 355, 356, the 'personal indenture' created by the relation of the seaman to his vessel. * * * In short, the right to maintenance, cure and wages, *implied in*

law as a contractual obligation arising out of the nature of the employment, is independent of the right to indemnity or compensatory damages for an injury caused by negligence; and these two rights are consistent and cumulative.

The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, *both grounded on tort*, that we think an election is to be made under the maritime law as modified by the statute. Unseaworthiness, as is well understood, embraces certain species of negligence; while the statute includes several additional species not embraced in that term. But, whether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, *West Cape, Baltimore S. S. Co.* v. *Phillips, supra*, 321, for which he is entitled to but one indemnity by way of compensatory damages.

Consider in the light of these several remedies and the extent of the inconsistency between them, we agree with the view expressed by the Supreme Court of Washington *that the statute was not intended to restrict in any way the long-established right of a seaman to maintenance, cure and wages—to which it made no reference.* And we conclude that the alternative measures of relief accorded him, between which he is given an election, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness; and *that no election is required between the right to recover compensatory*

> *damages for a tortious injury under the new rule, and the contractual right to maintenance, cure and wages* under the old rules—the latter being a cumulative right in no sense inconsistent with or an alternative of, the right to recover compensatory damages." (Italics ours.)

It seems clear from the foregoing that this Court considered that it was not the intention of Congress in the *Jones Act* to interfere with the long-established rules of "maintenance and cure" for seamen in cases of illness or accident.

Congress had long been considering measures for the relief of American seamen (Seamen's Act, 1915) and was reasonably familiar with the law in respect to maintenance and cure—a relationship peculiar to the seaman's contract. In drafting the *Jones Act* it would have been a simple matter to have added the words "or illness" to make the law read:

> "That any seaman who shall suffer personal injury or illness in the course of his employment * * *; and in case of the death of any seaman as a result of any such personal injury or illness * * *."

The omission of the word "illness" from the statute was not accidental—Congress intended only that seamen should be placed in as favorable a position as railway employees in the matter of "personal injuries".

Reports of hearings of the committee of the Senate on the Merchant Marine Act indicate that there was no intent to change the maritime law except in cases of personal injury or death arising out of *accident* aboard ship.

The amendment of 1920 (Section 33) was proposed by the Senate to the original House of Representatives bill (H. R. 10378) and was adopted with no material changes. The language was proposed by Mr. Furuseth himself who

was attending hearings before the Senate Committee in his capacity as President of the International Seamen's Union of North America. The following is an excerpt from the report of the hearing held on February 27, 1920 (Commerce Committee Hearings, 66th Congress, p. 1712):

> "The Chairman (Senator Jones): 'What is the amendment you suggest to Section 20 (of the Seamen's Act of 1915)'
>
> Mr. Furuseth: 'That any seaman who shall suffer personal injury in the course of his employment, may at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply. And in the case of the death of any seaman as the result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. That is the amendment.'
>
> Senator Fletcher: 'In other words under the common law if a sailor should step through an open hatch that had been left carelessly open, he would have no remedy.'
>
> Mr. Furuseth: 'He would have no remedy.'
>
> Senator Fletcher: 'And now you want to change that so he would have a remedy provided that his own negligence did not bring about the injury.'
>
> Mr. Furuseth: 'That is it exactly'."

The report of the Managers for the House of Representatives in commenting on the Senate's amendment (No. 139) states:

> "This amendment amends Section 20 of the Sea-

men's Act so as to extend the Federal Employers' Liability Act to cases of personal injury *to or death of* seamen" (Cong. Record, Vol. 59, part 8, p. 8409, 66th Cong., 2nd Session, June 3, 1920).

The scope of relief under the *Jones Act* is obviously limited by its terms to cases defined in the *Employers' Liability Act.* This Court has recognized this limitation in a very recent decision, *Jamison* v. *Encarnacion,* 281 U. S. 635. The facts involved the question of whether a longshoreman, assaulted by his gang boss in the supposed course of his duties, could recover under the *Jones Act.* The Court stated in its opinion:

> "He is entitled to recover if within the meaning of Section 1 (of the Employers' Liability Act) his injuries resulted from the negligence of the foreman. The question is whether 'negligence' as there used, includes the assau' in question."

Applying the same test to the case at bar, it is clear that no recovery under the Act should have been allowed. It is idle to contend that the Act for the benefit of railway employees intended to embrace in the use of the term negligence a breach of a duty which never existed at common law but only under the old maritime rules.

It seems to counsel that the answer to petitioner's attempt to bring this case within the scope of the *Jones Act* is the same as was given by this Court in the case of *Chelentis* v. *Luckenbach Steamship Company,* 247 U. S. 372. In that case, the petitioner's contention was that Section 20 of the Seamen's Act of 1915 declaring "seamen having command shall not be held to be fellow servants with those under their authority" imposed a new and different obligation upon shipowners. This statute was held ineffective, the Court, speaking of the liability for maintenance and cure, stating (p. 384),

> "but the Maritime law imposes upon a shipowner

liability to a member of the crew injured at sea by reason of another member's negligence, without regard to their relationship; it was of no consequence, therefore, to petitioner whether or not the alleged negligent order came from a fellow servant: the statute is irrelevant."

The liability referred to is the only liability upon which the present action can be based. The Seamen's Act as amended by the *Jones Act* has been held to have changed the Maritime law by giving a new cause of action to seamen injured by negligence, in which the defense of negligence of a master, officer or fellow servant is eliminated and the contributory negligence rule changed to the Maritime rule of comparative negligence; but, in the contractual Maritime action for failure to provide cure, these defenses were never available to the shipowner. The duty was non-delegable as is the duty to provide a seaworthy vessel. The negligence of a master or a mate never constituted a defense to the shipowner in such an action. It was irrelevant. The fellow servant rule has always been limited to the negligence of fellow servants engaged in the same work as the injured man. This rule could hardly apply in the case of negligence in affording medical treatment in cases of illness or injury.

In *Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S. 642 (1886), the action was brought to recover for damages suffered by a railroad employee injured by reason of defective machinery. Dismissal of the suit was urged on the ground that the plaintiff was a fellow servant of the Agent of the Company in charge of keeping the cars in order. This Court stated in its opinion (pp. 647, 648):

> "The general doctrine as to the exemption of an employer from liability for injuries to a servant caused by the negligence of a fellow servant, in a common employment, is well settled. * * *
>
> It is equally well settled, however, that it is the

duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful co-laborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by courts of the highest character that it can hardly be considered as any longer open to serious question."

In the *Iroquois*, 194 U. S. 240, 241, this Court said per Brown, *J.*:

"This was a libel filed in the District Court for the Northern District of California by Matthew Bridges against the ship *Iroquois*, to recover damages for a failure of the master to provide suitable surgical treatment and care for the libellant, who had suffered injury by a fall from the mainyard to the deck of the vessel."

* * * * * * * * *

"The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all Maritime nations. It appears in the earliest codes of Continental Europe and was expressly recognized by this Court in the recent case of the *Osceola*, 189 U. S. 158."

The decision in this case was not "that it was negligence not to divert the ship", as asserted in petitioner's brief (p. 35), but on the contrary that the ship was responsible in damages for the master's failure to discharge the duty imposed as a part of the contract. The opinion does not specifically declare that the lien allowed against the *Iroquois* arose out of the breach of the contract of employment, but the reference to the *Osceola* and the opening statement of fact clearly imply that the decision was under the rules therein enumerated, including the following (p. 175):

> "That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

It seems obvious that the recovery allowed in the *Iroquois* was on the theory of contract, and that under the Maritime law any recovery on the theory of negligence was impossible.

It follows that, in all actions brought prior to the passage of the *Jones Act* in 1920 involving maintenance and cure or the failure to provide the same, the courts were granting recoveries on a contract and not a tort theory.

In *Harden* v. *Gordon*, 2 Mason 541, decided in 1823, Story, *J.*, a Judge of great experience in maritime law, had before him a libel which included a claim for the expenses occasioned by the sickness of a seaman in a foreign port. Speaking of the right of the seaman to be healed at the expense of the ship he said (p. 543):

> "It constitutes, in contemplation of law, a part of the contract for wages, and is a material ingredient in the compensation for the labour and services of the seamen."

And at pages 545, 546:

"In the *Madonna D'Idra* (1 Dodson 37), where a claim was made on behalf of Greek sailors for subsistence after their discharge from the ship, as well as for antecedent wages, the court did not hesitate to decree it. 'It is,' said the learned Judge on that occasion, 'wages paid in another form, it is part of the compensation for their labour; and according to the law of the country, to which these men belong, subsistence in the intermediate time must be presumed to form part of the contract for the payment of wages.' In what respect does subsistence in case of a discharge differ from additional subsistence in case of sickness? To use the language of the court, it is but 'wages in another form,' additional wages to meet additional expenses, and constituting, if the maritime law and usage uphold the claim, a part of the contract."

And at page 547:

"But I do not mean to dwell further on this point. My opinion is, that if the plaintiff is entitled to be cured at the expense of the ship, it is a claim in the nature of additional wages during the period of sickness, and is just as proper for a suit of this sort, as a claim for additional pay, while in port, or for subsistence in port, where that has been unjustly withheld. It stands upon the same analogy, as the compensation allowed by our laws in cases of short allowance of provisions and water, where it is expressly provided, that the amount shall be recoverable in the same manner as wages. It is a part of the maritime hire and reward, constituting an essential term in the contract, and no more objectionable in point of jurisdiction than a claim for any other allowance in the ordinary course of trade, or any specific stipulation for an increase of com-

pensation in extraordinary exigencies. The question of jurisdiction may then be dismissed."

In *Reed* v. *Canfield*, 1 Sumner 195, Story, *J.*, in the Circuit Court affirmed a decree awarding the expense of cure to a seaman for more than a year after he left the ship and said (pp. 202, 203):

> "The seaman is to be cured at the expense of the ship, of the sickness or injury sustained in the ship's service. It must be sustained by the party, while in the ship's service; and he is not to receive any compensation, or allowance for the effects of the injury. But so far, and so far only, as expenses are incurred in the cure, whether they are of a medical or other nature, for diet, lodging, nursing, or other assistance, they are a charge on, and to be borne by, the ship. The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability. They are not in any just sense liable for consequential damages."

The above two cases contain an interesting discussion of the history of the law of maintenance and cure.

Various decisions specifically confirm the view that in this class of case no change in the Maritime law of maintenance and cure was effected by the *Jones Act*.

> *Pacific Steamship Co.* v. *Peterson, supra;*
> *Lindgren Admr.* v. *The United States, supra;*
> *Persson* v. *Gulf Refining Co.*, 228 App. Div. 366;
> *Morris* v. *United States*, 3 F. (2d) 588;
> *Willey* v. *Alaska Packers Ass'n*, 9 F. (2d) 937;
> *Cresci* v. *Standard Fisheries*, 7 F. (2d) 378;
> *The Hanna Nielson*, 273 F. 171.

In the case of *Persson* v. *Gulf Refining Company*, 228 App. Div. (N. Y.) 366, a suit was brought by a seaman for indemnity based on two causes of action—the first, negligence in causing plaintiff's injuries, second in failing to provide him with cure for the said injuries. Both Trial Court and the Appellate Division regarded the first cause of action as being under the *Jones Act* and the second based wholly on the old maritime law. On the appeal the defendants assigned error in that the Trial Court did not compel plaintiff to elect. Plaintiff admitted that the second cause of action was under the old rules but claimed that such action was not an alternative of the action under the *Jones Act* for causing the injury. It was argued that the second cause of action arose independently of any negligence in causing the injury, and that therefore no election was required between the two consistent and concurrent causes of action alleged.

The Appellate Division stated in its opinion, page 366:

> "No negligence on the part of the defendant was established in this record, so far as it related to the first cause of action, which was assumed to be one under the Jones Act (Merchant Marine Act of 1920 (41 U. S. Stat. at Large, 1007), Section 33; now U. S. Code, tit. 46, Section 688), and which was made the subject of question No. 1 in the special verdict of the jury. Testimony, however, was adduced, credited by the jury, which established defendant's liability under the second cause of action, which should be construed as an action for compensatory damages for breach of the defendant's duty to furnish to the plaintiff, with reasonable promptness, cure for injuries received aboard ship. The jury could probably hold that this duty was breached and that this plaintiff should have been given medical treatment at the available marine hospitals in the ports that the vessel passed *en route*

> to Port Arthur, Texas. The allegations in the second cause of action, so far as they might be construed to allege a cause of action other than that just stated, should be disregarded as surplusage. On such a view, the complaint may not be deemed to contain inconsistent causes of action between which an election by the plaintiff might properly be required on the motion of the defendant."

This case is a clear indication that neither courts nor counsel considered the cause of action founded on the breach of duty to provide a cure to the injured seaman to be based upon the *Jones Act,* or to have any connection therewith.

The substantial charges in this case are based upon the alleged non-performance on the part of the defendant of its duty to land plaintiff at some port on the voyage north, to furnish medical treatment or to take him to the hospital sooner than he was taken. Such charges are of necessity based only on the theory that a contractual duty owed by the defendant to the plaintiff has not been performed. The fact that failure to provide medical treatment is a breach of a contractual duty rather than a tort is clearly indicated in the opinion in the case of *Morris* v. *United States,* 3 Fed. (2d) 588, 591 (C. C. A. 2nd Circ.). In that case the plaintiff, a seaman, suffered a hernia on the voyage from Southampton to New York City. No medical attendance was given to him and he was not put ashore at an intermediate port in the Azores where the vessel made a stop. Although there were various causes of action alleged the only one considered valid by the Court was that based upon failure to provide medical attention. The Court stated in its opinion by Manton, *C. J.* (p. 591):

> "Indeed, it was the duty of the captain of the vessel to obtain medical aid at the intermediate port of the Azores for the injured seaman if he had no

> means of affording medical attention on board. * * * Even though the captain was mistaken, and committed an error of judgment in believing that the appellant was shamming, this fact does not relieve the ship from the responsibility it owed to the seaman. *Unica* v. *U. S. supra.* The consequential damage due to the failure to afford medical aid and maintenance is a measure of damages which is to be awarded. Recoveries have been permitted for neglect to furnish the proper medical care and treatment in actions instituted for consequential damages. * * * The right of recovery for maintenance and cure does not allow recovery for pain and suffering or compensation for injury due to physical incapacity. * * * A right of action for damage for maltreatment is not pleaded here."

It is clear that the Court considered the cause of action one founded on contract rather than in tort for in a tort action obviously recovery for pain and suffering would have been allowed. The cause of action arose subsequent to the *Jones Act* and the libel was *in personam.* The Court could therefore have applied the *Jones Act* had it considered the cause of action as one founded in tort.

Another case, involving a similar cause of action, against a shipowner is that of *Willey* v. *Alaska Packers' Association,* 9 Fed. (2d) 937, (aff'd 18 Fed. (2d) 8), Northern District of California, in which it was held that the vessel owner's failure to furnish medical attention to a seaman as agreed did not give the seaman's executor a cause of action for death "by wrongful act or neglect" within the California death act which applies only to torts; also that the Federal Employers' Liability Act, giving a cause of action for death resulting from carrier's negligence creates a liability based on tort and not on contract, and that a tort action does not lie for an omission to perform a con-

tractual duty even if wilful, but there must be some active negligence or misfeasance. The Court said (p. 938):

> "Section 377, Code Civ. Proc. Cal. it is argued, does not merely enable an administrator or executor to enforce claims for personal injuries to his decedent, as is done by some statutes, but creates new and entirely independent rights, to which he does not *succeed*, but which on behalf of other persons he is empowered to enforce.
>
> That section, however, by its express terms is applicable only to cases of 'death * * * caused by the wrongful act or neglect of another'; in other words, to cases of tort and not of contract. Thus construed, it has no possible reference to the instant case, where no positive wrong on the part of respondent has been alleged, and where the only affirmative duty shown to have been omitted was wholly contractual. The fact that this duty, in addition to being within the terms of a written contract, also was imposed by federal statute, in no way changes the situation. As I held in *Cresci* v. *Standard Fisheries Co.* 7 F. (2d) 378, a vessel owner's statutory obligation to furnish maintenance and cure is only one of the incidents which the law affixes to every contract of marine employment, and breach of it creates a liability which in its essence is wholly dependent on contract. The libel, therefore, does not state a cause of action for death 'by wrongful act or neglect,' within the meaning of the Code section above referred to."

and on re-hearing (p. 939):

> "Section 1 of the federal Employers' Liability Act (Comp. St. Sec. 8657), to which my attention has been directed, creates rights of action for 'death resulting in whole or in part from the *negligence* of any of the officers, agents, or employees of (a) carrier, or by reason of any defect or insufficiency, due

to its *negligence.* * * *' Here the word 'wrongful' has been left out; but in my opinion its omission produces no different result, for the liability intended to be created, like that under the California Code, is purely one in tort.

Libelant maintains that under this act the liability for injuries incurred by railroad employees (and seamen) in each case rises out of a contract of employment, and hence that the contractual origin of the duty said to have been violated here is immaterial. This amounts to saying that as a result of the act the law implies, as a term of the contract of employment, an agreement that the employer's agents, officers, and other representatives will take due care not to injure the employee, and to say the least is artificial. Furthermore, the history of the act, traceable in reported cases, shows that Congress intended to *add* no such legal implication to the contract.

'The federal Employers' Liability Act is an act, as its name imports, to regulate the liability of employers, and, as its body shows, is applicable only to liability in tort for negligence. *No new right of action is given;* all that is done is to take away certain defenses which had come to be thought unjust. *The legal liability of the employer under the act does not depend upon the terms of the contract of service, and is neither increased nor diminished thereby.' Rounsaville* v. *Central Ry. Co.* 87 N. J. Law, 371, 94 A. 392.

Libelant answers this by saying that the instant case actually is one of negligence, and that, because negligence results in tort, a recovery may be allowed. If such be the rule, then every negligent breach of contract must be a tort, for the decedent in this case was injured through the active fault of no one but himself, and the only affirmative duty alleged to have been omitted by respondent, depends entirely upon a contractual obligation.

* * * * * * * * *

But one authority has been discovered which is on all fours with the present case. *Galveston, Houston & Southern Railway Co.* v. *Hennegan,* 33 Tex. Civ. App. 314, 76 S. W., 452, 453. There it was held in a carefully reasoned opinion, that where an employer fails to furnish an employee with medical attention, as he has agreed to do, the employee's cause of action is for breach of contract, and not in tort for negligence. Cooley, Pollock, Shearman & Redfield, and Bishop are shown to be as one upon the question. An omission to perform a contract may not be treated as negligence. The case is directly in point and decisive."

In *The Hanna Nielsen,* 273 Fed. 171, *supra* (C. C. A., 2d Circ., opinion by Hough, *J.*), a libel was filed by a seaman on a Norwegian vessel for injuries and/or cure and maintenance. The District Court dismissed the claim for injuries but allowed cure and maintenance. The Circuit Court of Appeals directed the dismissal of the libel *in toto* on the ground that the right to cure and maintenance was contractual and therefore governed by the Norwegian law, with which it had been proved the ship complied.

In *Cresci* v. *Standard Fisheries et al.,* 7 Fed. (2d) 378, *supra* (N. D. Cal.), Kerrigan, *J.,* held that a seaman's libel for wages, maintenance and cure was based on contract and therefore was not barred by the statute of limitations of California, Section 340, subdivision 3, prescribing one year limitation for tort actions such as actions for injury to or for the death of one caused by wrongful act or neglect, saying (pp. 378, 379):

"The latter (actions for maintenance and cure) are, as stated, in reality actions for breach of contract. Although the articles may be wholly silent upon such points, law and reason imply certain

obligations on the part of the master and owner to the mariner, which are equally imperative as those expressed in writing. * * *

In every case, the duty arises by implication of law out of the relation of master and mariner, or that of owner and seaman. Since these are relations created by contract, the duty itself must be held to arise from a like source; for the incidents of a relation are inseparable from the relation itself."

In *Hughes* v. *Alaska S. S. Co.*, 287 F. 427, 428, 429 (W. D. Wash.), the Court, in speaking of the language of the Jones Act, Section 3, said:

> "The use of the expression 'at his election' shows that the remedy granted by section 33 for a tort is an alternative one to that already possessed by the seaman for his injury—the remedy of care and maintenance and wages to the end of the voyage, where he is injured in the service of the ship, and for full indemnity in case the ship was unseaworthy."

We submit that in determining whether the facts in the case at bar show an action based on tort or on contract this Court should consider primarily the decisions involving the application of maritime law. It is obvious that the maintenance and cure doctrine of the sea can never be wholly covered by the *Jones Act* or any other law predicated upon negligence. Many instances arise where sailors are given prompt hospitalization and thereafter recover for additional maintenance. These cases may only be brought on the theory of contract. Should the Courts allow recovery on any other theory because some employee of the responsible shipowner can be charged with personal negligence which may enlarge but does not alter the contractual duty of the shipowner? We urge that without indication of clear intention on the part of Congress (wholly lacking here) this

Court should not assume any purpose to change this fundamental maritime law or to encroach upon it by permitting in special cases recoveries involving this substantive right upon another theory of liability.

The cases, including these cited by petitioner, do not establish any common law rule permitting an election to sue upon a tort or contract theory in actions involving a failure to perform a contractual duty.

Discussion of Cases Relied on By Petitioner.

In *Meador* v. *Lake Shore & Mich. S. Ry. Co.*, 138 Ind. 290 (Pet. Brief, p. 12), the Court held that no case was made out for the jury as the plaintiff assumed the risk of the injury and therefore the quotations from the opinion found on page 13 of petitioner's brief would appear to be dicta.

Crawford v. *Davis, Director General*, 136 S. C. 95 (Pet. Brief, p. 26), does not really bear on the issues at bar. In that case Davis was held liable because his agent carelessly sent the plaintiff to an incompetent physician who treated him carelessly. It was expressly held by the Court that there would have been no liability if due care had been taken to select a competent physician.

In the case of *Karabalis* v. *E. I. DuPont de Nemours & Co.*, 129 Va. 151 (Pet. Brief, p. 26), the Court merely sustained a count alleging that defendant took the decedent to a hospital and forcibly ejected him, causing his death, when it knew he was not fit to leave. The case had nothing to do with either the Federal Employers' Liability Act or the State Liability Act, as the Court held.

The Court was careful to point out however (p. 173) that if it appeared on the trial that the defendant exercised due care in the selection and retention of those in charge of the hospital there might be no liability on the defendant.

In the case of *Harris* v. *Pennsylvania Railroad Co.*, 50 Fed. (2nd) 866 (Pet. Brief, p. 13), the defendant was held liable for failure to rescue an employee who fell overboard from a car float and was drowned, and no question of maintenance or cure was involved. It clearly dealt with a case of accident, personal injury and negligence. The facts really fell within the line of some cases in which it was held that, at common law, the duty was imposed upon the Master, in case of sudden emergency, to take steps to save the life of the servant or save him from further grievous injury.

In *Atchison, T. & S. Fe Ry. Co.* v. *Hix,* Tex. Civ. App. 291 S. W. 281 (Pet. Brief, p. 27), plaintiff's intestate was knocked from the side of a box car, run over and his two legs almost severed from his body. The question of negligence of a fellow servant dealt with by the Federal Employers Liability Act was not involved in this case at all, but only the emergency treatment rule recognized by several state courts. Moreover, as the Court held there should be no recovery since there was no evidence to sustain a finding of negligence the statements in the opinion relied on can not really aid in the solution of the case at bar.

In *Northern Central Ry. Co.* v. *The State,* 29 Md. 420 (Pet. Brief, p. 23), the deceased was struck by defendant's train, rendered insensible and then, thought to be dead, was locked up by the Railway Co. in a warehouse over night, resulting in his death from hemorrhage. In this case there was no master and servant relation. The deceased was struck by a train while riding a horse across the defendant's right of way. The action was clearly for misfeasance.

In *Baker* v. *Adkins,* 278 S. W. 272 (Pet. Brief, p. 22), the Texas Court of Civil Appeals approved the doctrine

that a Railway Company was under a duty to care for an employee suddenly stricken by injury, but held that this duty terminated with the emergency. In this case the Railroad Co. prevented the deceased's wife from attending him when stricken with smallpox, but insisted on taking exclusive charge and placing him in a box car in the yard which was subject to frequent collisions. The finding in this case was based on the rule that, where the master insists on or assumes the care of an injured servant, he is bound to exercise reasonable care. Here also affirmative acts were done by the Master to the servant's detriment.

In *Carey* v. *Davis,* 190 Iowa 720 (Pet. Brief, p. 22), a farm laborer being overcome by the heat in a gravel pit, the Master removed him to a wagon box in the sun where he was in a more exposed condition, clearly an act of misfeasance. The Court held that, in the absence of contract, a master is under no legal duty to treat a sick or injured servant, but only to exercise reasonable care to relieve him in an emergency. The quotation from this case in petitioner's brief leaves out an important part of the proposition of law laid down by the Court. The whole quotation is as follows (p. 723):

> "It is unquestionably the well settled rule that in the absence of any agreement or contract therefor, the Master is under no legal duty to care for a sick or injured servant for whose illness or injury he is not at fault. Though, not unjust in principle, this rule if carried unflinchingly and without exception to its logical extreme, is sometimes productive of shocking results. To avoid this criticism, there is a tendency of the courts to hold that where, in the course of his employment, a servant suffers serious injury, or is suddenly stricken down in a manner indicating the immediate and emergent need of aid to save him from death or serious harm, the Master,

> if present, is in duty bound to take such reasonable measures or make such reasonable effort as may be practicable to relieve him, even though such master be not chargeable with fault in bringing about the emergency."

In *Troutman's Administratrix* v. *Louisville & Nashville Railroad Co.*, 179 Ky. 145 (Pet. Brief, p. 24), a track repairman was run over and his legs practically severed. His Administratrix brought suit, charging the Railroad Co. with negligence in failing to procure the services of a physician immediately. The action resulted *in the dismissal of the complaint* on the ground that the plaintiff failed to make out a case. The Court's statement of the law governing the case, however, clearly shows the limitation of the Common Law rule to emergency treatment (pp. 157, 158).

> "Coming now to apply what has been said to the case that we have, our opinion is that when an employe of a railroad company is injured while attempting to perform some service within the scope of his employment, whether his injuries are due to his own want of care or to the negligence of the railroad company, the company through its superior servants immediately in charge at the place where the accident occurs, such as the conductor in this instance, is under a duty to take such action as may be reasonably necessary and sufficient under all the surrounding circumstances to furnish the injured employe medical aid and attention suitable to the injury received, if there are no members of his family present who are capable of performing and do undertake to perform this service; and this duty exists although there may be no contract obligation requiring it or statute making it mandatory. We do not, however, undertake to lay down any rule as to the length of time this care and attention must

continue. It is sufficient here to say that the duty to observe it springs out of an emergency, and a variety of circumstances may control its duration."

The quotations from Benedict on Admiralty found in petitioner's brief on page 28 can best be understood by reading the whole sentence of which the quotation is only a part, from which it appears that the author was discussing only the question of admiralty jurisdiction and the only case cited thereunder, *Hughes* v. *Alaska S. S. Co.*, 287 Fed. 427, laid down the law contrary to that contended for by the author.

In the case of *Neil* v. *Flynn Lumber Co.*, 71 W. Va. 708 (Pet. Brief, p. 25), the servant had broken his leg and the defendant had contracted with him to furnish medical and surgical services. A physician was furnished to set the leg, but the treatment thereafter was performed by an incompetent layman furnished by the defendant, resulting in damage to the servant. The Court held that the relation of master and servant does not apply to the relationship between a corporation and a physician employed by it to care for its servants, and the rule of *respondeat superior* does not apply, but that the Master is only held to reasonable care in selecting a physician who shall have ordinary skill. It is true that the Court held that a demurrer to the complaint, on the ground that the action was in trespass on the case instead of *in assumpsit*, should have been overruled, but, as the action was really for misfeasance and as defendant neither appeared on the argument of the appeal nor filed any brief, and it was a question of local state practice, the action of the Court is easily understood.

This case is readily distinguishable from the case at bar for the reason that the complaint was based upon the unskillful treatment by a layman engaged by plaintiff's employer and not for non-feasance, viz., the failure to provide treatment.

In *Salla* v. *Hellman*, 7 Fed. (2d) 953 (S. D. Cal.) (referred to in Pet. Brief, p. 15), a libel of a seaman against a shipowner, the Court applied the Act of Congress of March 30, 1920, known as the Death on the High Seas Act. In the whole opinion no mention is even made of the Jones Act. If either Court or counsel believed that the Jones Act had any application it is unthinkable that it would not have been mentioned. The use of the word "negligence" in connection with the failure of the master to make any effort to rescue a seaman who had gone overboard, is of no importance as the Court was applying the Death on the High Seas Act which clearly permits recovery for a breach of obligations arising out of contract or tort.

In the cases cited in petitioner's brief, Part 2 of his Argument (pp. 29 to 34) all except possibly the English case of *Boorman* v. *Brown*, 3 Q. B. 511 (Pet. Brief, p. 29), contain elements of misfeasance or tortious acts, and consequently have no application here where the only charges on which any case could conceivably be made out were charges of non-feasance.

We might add that only two of the cases cited by the petitioner in Point I of its brief involved the Federal Employers Liability Act. These two cases are *Atchison, T. & S. F. Ry. Co.* v. *Hix, supra,* and *Troutman's Administratrix* v. *Louisville & Nashville Ry. Co., supra,* in both of which the complaints were dismissed.

Conclusion to Point I.

The contract right of a seaman to maintenance and cure, whether or not the condition requiring it was caused by the master's negligence, is so different from any right or duty of the servant or master on shore that common law

causes involving master and servant relations on land are of little real help in the solution of the question here. As we have seen, the cases hold that there is no general duty at common law owed by the master to the servant to furnish medical services but in some jurisdictions a limited duty to provide emergency relief and then only while the emergency lasts.

On the other hand, under the law of the sea, the obligation to furnish maintenance in addition to cure extends for a reasonable period after the seaman has left the ship and is on shore, *e. g.,* in the case of *Reed* v. *Canfield, (supra)*, where the obligation was extended to medical treatment and expenses of a seaman for more than a year after he had left the ship. When we consider that not only the cure but the maintenance of the seaman together with a lien therefor on the ship (*The Montezuma,* 19 Fed. 2nd, 355) are given under the law of the sea for such extended periods after the relationship ends and where the injury to the seaman was not connected with any negligence on the part of the vessel, it is easily understood why Congress did not intend, when the Jones Act was passed, to add to the shipowners' burdens by engrafting on the law of maintenance and cure a remedy for loss of life. The difficulties presented even to an intelligent and careful master at sea in the case of hidden ailments of his crew are another reason for leaving the law as it has stood for over a century.

Counsel submit that it has been shown that the cause of action for failure to provide cure has been considered a contractual action since the decisions of Judge Story over a hundred years ago. Prior to the passage of the *Jones Act* in 1920, no cause of action was given to a seaman arising out of negligence except in cases of unseaworthiness of the vessel. In cases brought after the *Jones Act,* no recovery has been granted under that Act for failure to provide cure, so far as counsel have been

able to ascertain, and this Court, in the opinions cited under this Point, has clearly intimated that, in its opinion, Congress did not intend in the *Jones Act* to interfere with the Maritime Law rules involving the doctrine of maintenance and cure.

The language of the *Jones Act* itself and the history of its passage indicate that Congress was endeavoring to change the Maritime Law by giving to seamen the rights then enjoyed by railroad employes in respect to accidents, namely in abolishing the fellow servant defense and in applying the common law rule of *respondeat superior*. Congress did not intend, in using the term "personal injury" to embrace cases involving the treatment of an illness and Congress did not intend, in using the word "negligence", to cover cases involving the breach of the implied contract to provide maintenance and cure.

The *Jones Act* has no application to the case at bar.

POINT II.

The reversal and dismissal of the complaint should be sustained as the proof failed to show that plaintiff's intestate's death was caused by respondents' negligence.

The charges of negligence in the complaint are six in number. For convenience in analysis they may be grouped as follows:

1. Negligence in the treatment of Santiago on the ship.

   a. Forecastle where Santiago was kept during his illness was dangerously cold and the heating apparatus was defective.

   b. Forecastle was filthy and unsanitary and bedding was insufficient, and not properly cared for.

c. Failure to keep Santiago in the hospital room.

d. Failure to furnish Santiago with proper and sufficient food.

2. Failure to obtain aid from passing vessels and failure to obtain prompt medical assistance after the vessel's arrival off Staten Island.

Assuming the specifications of negligent treatment on the ship to have been sustained there is no evidence to sustain a causal connection between any one or all of the conditions complained of and the death of Santiago or the aggravation of his illness.

a. *Charge of cold quarters and defective heating apparatus.*

The daily record of temperatures, taken on the bridge of the steamer and stipulated in evidence, of itself refutes the charge that the forecastle was "dangerously cold" (Defendant's Exhibit B, R. 177, 178). Santiago fell ill on the morning of October 17th and not until 4 P. M. on October 20th did the outside temperature fall below 70°. Thereafter until the ship reached port the temperatures taken varied from 78° high to 60° low. Plaintiff's only medical witness was Dr. Kienzle of the Staten Island Marine Hospital. He testified that a pneumonia patient "should be given all the fresh air possible, in fact, on my wards, I always have all windows down from the top, *even in severe cold weather.* * * * Even in damp rainy weather, a man should have plenty of fresh air" (R. 71). This fresh air treatment is, of course, confirmed by the testimony of Dr. Baldwin (R. 142).

In view of the foregoing it would seem unnecessary to go into the question of artificial heat in the forecastle. There is no testimony on the part of the plaintiff that the steam pipes in the forecastle were defective or that any witness asked for steam to be turned on during this voyage.

On the contrary, the testimony of the ship's officers is to the effect that the heating apparatus in the forecastle was in first class condition (R. 101) and that there was no request that steam be turned on (R. 119). Officers and crew agree that no steam was needed (Kounse, R. 127; Callis, R. 111; Thomas, R. 161; Deelande, R. 164; Escabi, R. 168). If the steam had been turned on, it would have been so hot that the crew would have to have left the forecastle (Escabi, water tender, R. 168; Kounse, R. 127).

b. *Charge that forecastle was filthy and unsanitary and that Santiago's bedding was insufficient and not properly cared for.*

A great part of the testimony on the trial is concerned with the presence of water in the forecastle. Plaintiff's witnesses did not agree upon its source, nor upon the frequency with which it was mopped up, but as they all agree upon its presence, it was an issue for the jury if there had been any testimony of causal connection. It would certainly not be assumed without proof that the presence of salt water on the floor of the forecastle would change the degree of dampness prevailing at sea. The only medical testimony on this point is that of Dr. Baldwin, who stated that the leakage of salt water on the floor would in his opinion have no effect upon the course of Santiago's disease (R. 138).

Santiago kept his clothing on during the voyage north, including his underwear, a shirt and pants (R. 20, 126). In addition, all plaintiff's witnesses agreed that he had one blanket, described by the witness Lopez as heavy (R. 12, 38). The witness Rosado stated that the bed clothes consisted of a blanket and two sheets (R. 83) and the ship's witnesses said that in addition there was a bedspread (R. 161, 164, 127). Assuming, however, that Santiago had only one blanket in addition to his clothes, with outside temperatures never lower than 60° it cannot be assumed in the

absence of proof that Santiago's condition was aggravated or his death caused by reason of insufficient bed clothes. It is true that Dr. Kienzle said he would recommend two blankets when the outside temperature was 60° (R. 78), but he does not state that the use of one blanket would be dangerous. In fact, the question and answer did not include as a fact that the patient had his clothes on in bed. Dr. Baldwin considered that one blanket under the circumstances was sufficient (R. 142). The steward, however, did furnish Santiago with an extra blanket which he did not use (Fielding, R. 157).

The testimony of Rosado concerning the soiling of Santiago's bunk and bed clothes is possibly true (R. 82). However, the bunk was changed the next day and he was given Rosado's blankets (R. 85), and in any event there is no attempt to connect up this incident with the aggravation of Santiago's illness—such aggravation cannot be inferred.

c. *Failure to keep Santiago in the hospital room of the ship.*

There is no testimony in the case that Santiago would have been more comfortable or better treated in the hospital room of the ship. Dr. Baldwin testified that it was, to a certain degree, carelessness not to put Santiago in the hospital room (Rec. 142), but again no attempt was made to show that such failure had any bearing upon Santiago's death. The captain stated that he kept the man in the forecastle as he saw nothing contagious about the man's illness, and he would get better treatment there than alone in the stern of the ship (R. 101).

d. *Failure to furnish Santiago with proper and sufficient food.*

Plaintiff's witnesses do not agree upon the question of food. The only one who stated that food was not served Santiago was Coto (R. 90), and his evidence on this

point was shown to be patently untrue or mistaken by the witnesses on both sides. This is the same witness who had water leaking into the forecastle from the deck above—a statement denied by plaintiff's other witnesses (R. 41). The witness Lopez stated that Santiago was given a little coffee or soup and bread, and Rosado saw the mess boy going forward with soup (R. 86). The ship's witnesses state that Santiago received soup or broth, and orange juice (R. 97, 125, 160, 161, 164). This diet is almost that prescribed by plaintiff's Dr. Kienzle (R. 66) and the omission of egg nogs alone can hardly be charged as actionable negligence, for the *Delisle* was registered under a prohibition flag. The charge of improper food was not substantiated.

2. *Failure to obtain aid from passing vessels and failure to obtain prompt medical assistance after the vessel's arrival off Staten Island.*

After sailing from Boca Grande, the *Delisle* proceeded around the Florida coast to Point Jupiter, which was reached about thirty-six hours after sailing, that is, in the early morning of October 18th (R. 114). The vessel's course was then out to sea following the Gulf Stream (R. 132). Santiago had then been ill about twenty-four hours, but the ship's officers had seen no alarming symptoms, and thought he was suffering from a grippy cold. The only testimony of the presence of passing vessels was that of plaintiff's witness Lopez. On cross examination he stated that the only vessels he saw were on the Florida coast (R. 27). The value to Santiago of a transfer to another vessel is a matter of doubt at best, and might have aggravated matters. At any rate there is no evidence that such a transfer would have prevented his death.

There remains the charge of failure to summon medical aid upon arrival at New York Harbor, Sunday night, October 21st. The master and other officers never appreciated

the fact that Santiago was suffering from pneumonia. It is not surprising that this did not occur to them when consideration is given to the fact that the man became ill in Florida with the thermometer averaging 80 degrees. Mariners associate pneumonia with cold weather and as a result of exposure to cold. It was quite logical for these officers to diagnose the case as a cold or fever of some sort and to treat it accordingly. Plaintiff's Dr. Kienzle stated on direct examination that the symptoms described might indicate a number of diseased conditions, not particularly pneumonia, *even to a doctor* (R. 63). The master thought he had grippe (R. 97) as did also the third officer Kounse, who had taken upon himself the care of Santiago (R. 124), probably because he had received U. S. Navy first aid training (R. 123). The treatment prescribed and given by Kounse was quinine, laxatives and a light diet (R. 124, 125).

The fever, which had originally been as high as 104° for several days before arrival, stood at 103°. Both the master and Kounse saw the man walking on deck on October 21st and thought he was getting better (R. 99, 125). If the Court should hold, however, that the officers' failure to appreciate the nature of the disease and its dangers is immaterial, the question of causation again arises. It is on this phase of the case alone that any medical testimony of causation was adduced. Dr. Kienzle testified that if Santiago had been given proper medical care, he would have had "a chance of 88 out of 100 of surviving" (R. 80). The medical care referred to by Dr. Kienzle is modern hospital treatment, namely, the use of serum, alcohol baths, special diet and purgatives. Dr. Kienzle admitted that his prognosis of recovery was based upon the patient entering a hospital within 24 hours after he became ill (R. 80), obviously impossible in this case. He further testified that mortality is in proportion to the time the patient reaches the hospital and that the

12% mortality experience was "based on patients received early at our institutions and able to take the pneumonia serum" (R. 55).

Dr. Kienzle's testimony established that the *type* of pneumonia in this case was the type caused by the Friedlander bacillus (R. 54). Dr. Kienzle, at the time he saw Santiago, had been admitted to the practice of medicine in New York only two months and in Kentucky only three years. His knowledge of pneumonia was not very thorough as indicated by his admission of error (R. 55) and his subsequent description of the pneumonia germ, "It is a pneumococcus organism—it is hard to remember all this pathological stuff, I guess you had better strike out bacillus all through—it is pneumococcus, a coccus type of bacillus which causes a typical growth on the blood agar".

However, Dr. Kienzle did know that there were various types of pneumonia (R. 70) and he refers to "this particular type in this case". As Friedlander was the only type mentioned, it is fair to assume that this was a *Friedlander bacillus* case. The inference from Dr. Kienzle's testimony is confirmed by Dr. Baldwin's statement that the spitting up of blood is a striking characteristic of the *Friedlander bacillus* pneumonia (R. 136). Dr. Baldwin is a pneumonia specialist, in charge of pneumonia cases at New York Hospital (R. 134).

Dr. Kienzle apparently did not know that serum treatment is never given in Friedlander bacillus cases. The testimony of Drs. Baldwin and Cornell on this point is so specific that it must be considered as established (R. 135, 151). This unfamiliarity with the distinction between types of pneumonia is most important in connection with the testimony on probable mortality. Drs. Cornell and Baldwin testified that mortality in *Friedlander* type cases runs from 70% to 90% as compared with an average mortality in other types of about 33% in hospital practice (R. 135, 151). In view of Dr. Baldwin's experience as a spe-

cialist in the disease, the corroboration of his testimony by Dr. Cornell and the evident gaps in Dr. Kienzle's scientific knowledge of the subject, it must be considered established that the Friedlander type of pneumonia is usually fatal and that Santiago was doomed by reason of the nature of his illness rather than by failure to receive medical treatment (R. 149).

By the weight of the medical testimony at bar, Santiago's chances of recovery with the best of treatment were slight. It was error to permit the jury to speculate as to whether his death was caused by the infection itself or by failure to provide hospital treatment.

In *Chicago M. & St. P. Ry. Co.* v. *Coogan,* 271 U. S. 472, this Court held that upon review of a judgment of a state court in a case under the Federal Employers' Liability Act, this Court would examine the record and if it was found that as a matter of law the evidence was not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier would be reversed. After considering the evidence this Court found that it lent no substantial support to the contention that the death of plaintiff's intestate, a brakeman who was run over by a car in a train, which was in process of being made up and coupled, was caused or contributed to by a pipe near the rail, which the railroad company had negligently permitted to remain in a bent condition (p. 472), saying at page 478:

> "When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture. That is not enough. *Pawling* v. *United States,* 4 Cr. 219,

221; *Patton* v. *Texas & Pacific Railway Co.*, 179 U. S. 658, 663; *Looney* v. *Metropolitan Railroad Co.*, 200 U. S. 480, 488; *St. L. & Iron Mtn. Ry. Co.* v. *McWhirter, supra*, 282; *St. Louis-San Francisco Ry.* v. *Mills, ante*, p. 344."

In *Patton* v. *Texas and Pacific Railway Company*, 179 U. S. 658, plaintiff, a fireman, sued for injuries alleged to have been received by the turning of a step as he descended from his engine. This Court held that there was not sufficient proof as to how the nut securing the step was loosened and that it might have been loosened by causes other than the defendant's negligence, saying at page 663:

> "And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion."

In *Johns-Manville* v. *Pocker*, 26-Fed. (2d) 204 (C. C. A., 8), an employee sued for injuries sustained when the end of a wire which he cut recoiled and struck his eye. The Court held that for plaintiff to recover there must be shown causal connection between breach of duty and injury; that it must be further shown that like injury due to alleged negligence could have been anticipated by a reasonably prudent person, and that although the question of proximate cause is ordinarily one for the jury, where there is no substantial evidence in the record on which to base a finding in favor of the plaintiff the Court should instruct for defendant. In this cause a judgment for the plaintiff was reversed because there were no sufficient proofs in the record to sustain it.

In *Collins* v. *District of Columbia*, 48 Fed. (2d) 1012 (Court of Appeals, D. of Col.), the Court held that the burden of proof was on a passenger in an automobile which plunged through a bridge railing to establish by preponderance of evidence that the accident was caused by the negligence of the traction company or the District of Columbia in leaving a bank of snow toward the curb of the bridge; saying (p. 1014):

> "The burden of proof at the trial was upon the plaintiff, in order to recover against either defendant, to establish by the preponderance of the evidence that the accident was in fact caused by the negligent act or omission of such defendant. The causal connection between the accident and the negligence of the defendant must not be left to mere conjecture or supposition. There is a complete failure of proof in the present record upon this vital point, and this fact defeats appellant's appeal in this court."

In *Ketterer* v. *Armour & Co.*, 247 Fed. 921, the plaintiff contracted trichinitis after eating a pork product manufactured by the defendant and claimed damages for negligence in inspection. In holding that the lower court properly dismissed the complaint, the court said (p. 931):

> "And as there might have been a number of microscopical inspections made without discovering the trichinae, which might still have been present and caused the very injury of which complaint is made, the failure to make tests cannot be held to be the direct and proximate cause of the injury complained of, and without which it would not have occurred. There is no liability for a negligent act unless the negligent act is the proximate cause of the injury. And to establish proximate cause it is necessary that there be a causal connection between the negligent

act and the injury. The act must have been such that without it the injury would not have happened. 29 Cyc. 489."

In the case of *Ford* v. *McAdoo,* 231 N. Y. 155, the death of a railroad brakeman was involved and the question was whether the deceased merely fell from the train or was pulled off by reason of an alleged defective hook. The Court, in reversing a judgment for the plaintiff below, said:

> "When inferences are thus clearly consistent, the one with liability and the other with no cause of action, the plaintiff has not met the burden which the law places upon her."

In *White* v. *Lehigh Valley R. R. Co.,* 220 N. Y. 31, involving the death of a railroad worker, the question was whether defects on a car's roof had a causal connection with the accident. The Court stated in its opinion:

> "If the facts are as consistent with the appellant's theory as with the respondent's, the plaintiff should have been nonsuited. It was not sufficient for the plaintiff to show that a defect might have caused the fall and death, if the circumstances indicate an equal probability that they were due to some other cause. The plaintiff was bound to make out her case by the preponderance of evidence. The jury must not be left to mere conjecture, and a bare possibility that the fall was caused in consequence of the negligence of the defendant is not sufficient. When the precise cause of an accident is left to conjecture and may be as reasonably attributed to a condition for which no liability attaches as to one for which it does, then the plaintiff is not entitled to recover, and the evidence should not be submitted to the jury."

Applying the law of these cases it is apparent that error was committed below in permitting the jury to speculate upon the cause of Santiago's death. The answer to the one

hypothetical question which injects any causation whatever into the case shows the conjectural element involved. Dr. Kienzle was asked if he could state with reasonable certainty whether Santiago would have survived if he had been given proper medical treatment. He said (R. 80):

> "I can state that with my experience he would have *a possible chance* of 88 out of 100 of surviving." (Italics ours.)

Upon the testimony of Drs. Baldwin and Cornell this possible chance is diminished to from one to three out of ten. In any event, the verdict declaring defendant liable for Santiago's death was a result of sheer guess work on the part of the jury. There was nothing in the evidence to *prove* causation and the complaint should have been dismissed or a verdict directed for the defendant.

POINT III.

In no event can the judgment of the District Court be reinstated without modification, as there was error in including therein interest on the verdict from the date of death.

As no action for death existed at common law or under maritime law, the judgment herein must be considered to have been entered upon a death statute. No statute was pleaded and the only one that could be considered without being pleaded is the *Jones Act,* which has been held to have become a part of the maritime law.

Under the Jones Act, interest upon a verdict from death is not recoverable. In neither the *Jones Act* nor the Federal Employers' Liability Act is there any provision for such interest upon a verdict.

Murmann v. *New York, New Haven & Hartford R. R. Co.,* 258 N. Y. 447;